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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

DANIEL JOSEPH HERBERT,

Defendant and Appellant.

A156178

(Napa County
Super. Ct. No. 17CR000158)

Daniel Joseph Herbert pleaded no contest to one felony count of carrying a concealed dirk or dagger. (Pen. Code, § 21310.)¹ The trial court sentenced Herbert to eight months in prison, consecutive to a sentence imposed by another county. Herbert appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 30, 2017, Herbert was arrested in a Walmart parking lot in Napa County. A day or two earlier, Herbert and another person were observed in the store acting in a manner that aroused the suspicion of staff members. On November 30, an asset protection associate began surveilling Herbert via closed-circuit television. The associate observed Herbert go behind the counter of the electronics department and place an item in his shopping cart. When Herbert attempted to leave the store without paying

¹ All undesignated statutory references are to the Penal Code.

for the items in his shopping cart, the asset protection associate approached him. Herbert immediately fled into the parking lot, leaving his shopping cart and the merchandise behind.

The associate flagged down a deputy sheriff from the Napa County Sheriff's Department, who happened to be patrolling the parking lot at the time. The associate directed the deputy to Herbert's vehicle. The deputy stopped the vehicle. Herbert was its only occupant.

When Herbert stepped out of the car, the deputy searched him, and found a straight-bladed or fixed-blade knife on his right hip, secured by a sheath to his belt. It was hidden underneath Herbert's shirt. The deputy also found a satchel hanging inside Herbert's pants on the left side. It contained methamphetamine, heroin, and Suboxone pills.

In the car, the deputy found electronic items and over a pound of marijuana. The electronic items were unopened and came from Walmart. Herbert said the items in the car belonged to his girlfriend. The girlfriend, however, claimed to have no knowledge regarding most of the items found in the car. The total value of the items in Herbert's shopping cart was \$756.75. The total value of the items recovered from the car was \$1,346.88.

On December 13, 2017, the Napa County District Attorney filed a complaint charging Herbert with two felonies and three misdemeanors. The felony counts were for receiving stolen property (§ 496, subd. (b)), and carrying a concealed dirk and dagger (§ 21310). The misdemeanor charges were for petty theft (§ 484, subd. (a)), and possession of controlled substances: heroin and methamphetamine (Health & Saf. Code, §§ 11350, subd. (a); 11377, subd. (a)).

At his arraignment on July 19, 2018, Herbert entered a plea of not guilty to all counts and the court appointed counsel. After a preliminary examination on August 24, 2018, the court held Herbert to answer to the charges. On August 30, 2018, the district attorney filed an information charging Herbert with three felonies and two misdemeanors. The felony counts were for receiving stolen property (§ 496, subd. (b); count one);

conspiracy to commit a crime (§ 182, subd. (a)(1); count two); and carrying a concealed dirk and dagger (§ 21310; count three). The misdemeanor counts were for possession of controlled substances: methamphetamine and heroin (Health & Saf. Code, § 11377, subd. (a); count four; Health & Saf. Code, § 11350, subd. (a); count five).

Herbert moved to dismiss the charge of carrying a concealed weapon, arguing it was unconstitutional. The court denied the motion. The district attorney moved to amend the information to add a prison prior. The record does not indicate whether the court ruled on the motion because, on October 9, 2018, Herbert pled no contest to the charge of carrying a concealed dirk or dagger and the court dismissed the remaining counts. The court denied probation, sentenced Herbert to eight months in prison, consecutive to his sentence in another county, and ordered Herbert to pay fines of \$370.

On November 16, 2018, Herbert moved the court for return of his marijuana. At a hearing on the motion on December 6, 2018, the court stated “the issue is whether all of the marijuana will be destroyed, or if Defendant is entitled to have 1 ounce of marijuana returned to him and the rest will be destroyed.” On January 4, 2019, the court ordered the destruction of the entire amount, but not until 60 days after the hearing. Herbert filed a notice of appeal.²

DISCUSSION

Herbert’s appointed counsel filed a *Wende* brief, asking this court to review the record to determine whether there are any arguable appellate issues. (*People v. Wende* (1979) 25 Cal.3d 436.) His appointed counsel informed Herbert that he had the right to

² On April 2, 2019, Herbert filed a petition for a writ of mandate to compel the court to vacate its order and to enter a new order granting his request for return of 28.5 grams of the marijuana. (*Herbert v. Superior Court*, Case No. A156832.) On April 11, 2019, Herbert moved to consolidate this case with the writ proceeding. On May 7, 2019, we denied the motion to consolidate. We address Herbert’s writ petition in a separate opinion.

file a supplemental brief on his own behalf. Herbert has not done so. We have reviewed the record pursuant to *Wende* and find no arguable appellate issue.

DISPOSITION

The judgment is affirmed.

Jones, P.J.

WE CONCUR:

Simons, J.

Burns, J.

A156178